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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

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 FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )

)  
 Amendment of Part 1 of the Commission's  
 Rules - - Competitive Bidding Procedures )

) WT Docket No. 97-82  
 ) FCC 99-384  
 )

To: The Commission

**COMMENTS OF BLOOSTON, MORDKOFSKY, JACKSON & DICKENS**

Blooston, Mordkofsky, Jackson & Dickens (BMJD), on behalf of its clients and pursuant to Section 1.45(a) of the Commission's Rules, hereby submits its comments in the above-captioned proceeding. BMJD is a communications law firm that represents numerous applicants and licensees in the various auctionable radio services. BMJD's clients include several small start-up entrepreneurs, rural telephone companies, and other entities that have participated in prior spectrum auctions, such as auctions for licenses in the Broadband Personal Communications Service, the Local Multipoint Distribution Service, the 800/900 MHz SMR Service, and the 929/931 MHz Paging Services.

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I. The Proposed Anti-Collusion Reporting Requirement Will Impose Substantial Legal Liability on Auction Participants and is Ill-Advised.

The Commission has proposed to require any applicant/participant in an FCC auction event, who makes or receives a communication of bids or bidding strategies prohibited under Rule Section 1.2105(c)(1),<sup>1</sup> to promptly disclose such communication in writing to the Commission. This proposal is in addition to Rule Section 1.65, which requires applicants to promptly amend their Form 175 short form applications in order to report any changes in the application subsequent to the application's submission, including any discussions which result in any agreements, arrangements, or understandings which relate in any way to the licenses being auctioned or to the post-auction market structure. At first blush this proposal would appear only to place an additional paperwork burden on auction participants to cover communications that do not result in an agreement regarding the auction or post-auction market structure, or disclosure of bidding strategy. However, upon closer examination, this proposed rule modification raises unnecessary liability issues for participants in the Commission's spectrum auctions.

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<sup>1</sup> The Commission is also proposing, in this proceeding, to amend Rule Section 1.2105(c)(1) in order to prohibit communications regarding other applicants'/bidders' bids or bidding strategies. BMJD does not oppose this rule change.

The Commission's anti-collusion rules are very broad and inherently ambiguous, such that the Commission is unable to delineate a bright-line rule as to what constitutes collusive communications. In fact, the Commission has asserted that communications which have an "affect" on the auction may violate the anti-collusion rule, even under certain circumstances concerning an ongoing agreement between the parties unrelated to the auction.<sup>2</sup> By its very nature, the anti-collusion rule must be applied to many unique factual circumstances, which may not have been foreseen at the time the rule was adopted. As a result, what does or does not constitute a violation of the anti-collusion rule is incapable of easy definition, and in recognition of this fact, the Commission has reminded auction participants that they, rather than the Commission, are in the best position to make this determination. See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd. 10030, para. 97 (1999) ("We continue to believe that bidders are in the best position to determine when their discussions may give rise to a potential violation of the rule."); Amendment of the Commission's Rules for Installment Payment Financing for the Personal Communications Services, Fourth Report and Order, 13 FCC Rcd 15743, para. 44 (1998) ("Individual applicants, and not the Commission, are in the best position to determine in

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<sup>2</sup> Taken to the extreme, one could argue anti-collusive behavior where a carrier negotiates a service agreement with its electric utility provider, who also happens to be affiliated with an applicant in the auction for the same market as the carrier. While no bidding information has been discussed, because an arrangement for new electric service could inadvertently telegraph bidding strategy to the electric utility by showing areas that

the first instant which communications are permissible and which are not”); Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures; Allocation of Spectrum Below 5 GHz, Third Report and Order and Second Further Notice of Proposed Rule Making, 13 FCC Rcd 374, para. 163 (1997) (“Because auction applicants should avoid all discussions with each other that will likely affect bids or bidding strategies, we believe that individual applicants, and not the Commission, are in the best position to determine in the first instance which communications are permissible and which are not.”). Thus, the collusion rule involves a judgement call by all parties involved.

It may be fair to require the initiator of a collusive communication to report such matters to the Commission. However, under the Commission’s proposed rule, the recipient of a communication that violates the anti-collusion rule would also be required to notify the Commission of the Communication within a specified period of time. This rule will essentially require the recipient of a communication to make a snap decision as to whether or not the communication has triggered the anti-collusion notification rule. If the Commission later disagrees with this judgement call, the innocent third party could find itself entangled in expensive litigation with substantial liability exposure: If the Commission finds that the reported communication did not rise to the level of collusion, the party who initiated the communication may sue the recipient for a tort, such as defamation of character/libel. If the recipient makes the judgement that it should not

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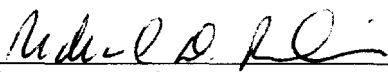
the carrier has a new interest in, the communications could be considered a violation of the Commission’s anti-collusion rules, and thus, be reportable.

report the communication, and the Commission later determines that the communication violated the anti-collusion rule, the recipient may face sanctions for failing to “squeal” on the violator. During every auction, there are compressed time-tables; and a snap decision could be, on the basis of 20/20 hindsight, the wrong decision. The ramifications of an incorrect decision could be quite costly, aside from the legal fees and lost productivity associated with the litigation. Accordingly, because of the lack of certainty as to what communications will or will not violate the Commission’s anti-collusion rule, and the substantial risk of legal liability for making what is essentially an incorrect judgement call, BMJD urges the Commission not to apply proposed Rule Section 1.1205(c)(6) to the recipients of an alleged collusive communication.

Respectfully submitted,

**BLOOSTON, MORDKOFISKY,  
JACKSON & DICKENS**

By

  
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